IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS; INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

From the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

APPELLANTS' BRIEF

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I. ISSUES

Whether the District Court erred in granting summary judgment to SME and the Commissioners and denying Plains Grains summary judgment:

(1) by ruling that the Commissioners' rezoning of 668 acres of land from Agricultural to Heavy Industrial was not spot zoning;

(2) by ruling that the conditional zoning was legal; and

(3) by ruling that the public's right to participate in the decision-making process was not violated.

II. INTRODUCTION AND PRIOR PROCEEDINGS

Generations of farm and ranch families have made their living working the productive soil and rangeland in the Salem/Highwood area east of Great Falls. The entire area was zoned "Agricultural" by Cascade County. Long before the area became home to farmers and ranchers, the Lewis and Clark Expedition hauled their gear across the then prairie in their famous Portage around the Great Falls of the Missouri, rendering it a designated "National Historic Landmark."

The Appellants, Plaintiffs below (collectively Plains Grains), include farmers and ranchers who own land contiguous to 668 acres of land which has been rezoned from Agricultural to Heavy Industrial for the stated purpose of Southern Montana Electric (SME) constructing an electrical generating station as the Highwood

Generating Station (HGS). Land in every direction around the HGS is both zoned Agricultural and used for agricultural production. As proposed to be built during the rezoning proceeding, the HGS industrial complex would require the construction of railroad lines, electric transmission lines, wastewater disposal and water lines, which would require condemnation of lands owned by Appellants, disrupting their agricultural operations and diminishing their quality of life. It would also cause the delisting of the Lewis and Clark Portage National Historic Landmark.

The Cascade County Commissioners (Commissioners) approved the zone change from Agricultural to Heavy Industrial on a 2-1 vote, subject to eleven conditions proposed by SME, and which apply only to SME. Cascade County has no zoning regulations which provide standards or procedures for conditional zoning.

Thereafter Plains Grains filed a Complaint and Application for Writ of Mandate and Writ of Review requesting the Court to declare void the zone change on multiple grounds, including that the action constituted illegal spot zoning, that the conditional zoning was illegal, and that the Commissioners violated the public's right to participate in the decision-making process.

On November 28, 2008, the District Court issued its Order on Motions for Summary Judgment and Writ of Mandamus/Writ of Review denying Plains Grains' motion for summary judgment and their application for writs. (Order attached at Tab

A.) In concluding that the rezoning was not spot zoning, the District Court mistakenly assumed that the power plant was "already permissible" in the Agricultural District. (Order at pp. 24-26; Tab A.) The District Court's conclusion constitutes a mistake of law and is based upon the manifest misapplication of the appropriate standards, including Montana Supreme Court precedent and Cascade County Zoning Regulations.

However, not all claims were resolved and judgment was not entered. Thus, on January 29, 2009, Plains Grains filed a Petition for Writ of Supervisory Control with the Supreme Court. On February 2, 2009, the Supreme Court directed the District Court, or its designee, to file a response. The District Court designated SME to respond, and SME filed a response. On April 29, 2009, the Supreme Court filed its Order, noting that:

> Plains Grains contends that the impending construction of the HGS constitutes an urgency or emergency factor that renders the normal appeal process inadequate. We agree. . . . We also determine that a mistake of law by the District Court on Plains Grains' spot zoning claim would cause a gross injustice in light of the inadequacy of the normal appeal process. As a result, we deem it appropriate to exercise supervisory control over the District Court to a limited degree.
>
> The District Court should resolve any remaining claims in Plains Grains' complaint and issue a final judgment.

(Order of April 29, 2009, pp. 4-5.)

On May 27, 2009, the District Court issued an Order denying summary judgment to Plains Grains on all claims and granting summary judgment to the Commissioners and SME on all claims. (Attached, Tab B.) Final judgment was entered and this appeal follows. Pursuant to the provisions of Rule 29, M.R.App.P., application has been made for the expedited determination of this appeal.

III. STATEMENT OF FACTS

On October 30, 2007, Duane and Mary E. Urquhart and Scott and Linda Urquhart (Urquharts) submitted a Rezoning Application to the Cascade County Planning Department requesting that 668.394 acres of their agricultural land, located approximately eight miles east of the City of Great Falls and just south of the Missouri River, be rezoned "from Agricultural (A-2) to Heavy Industrial (I-2)." (Tab C of Appendix, at p. 1.) The Urquharts submitted their Rezoning Application for the stated purpose of allowing for the construction and operation of SME's coal-fired electric power generating complex, known as the Highwood Generating Station (HGS). (*Id.*)

The majority of the materials submitted with the Rezoning Application consisted of materials describing HGS. (Tab C.) As stated in the Rezoning Application (Tab C, p 1.):

> The requested zoning to heavy industrial use is a prerequisite to the planned construction and operation of an electric generating station, known as the Highwood Generating Station (hereafter, "HGS"). Applicants intend to sell the rezoned property to Southern Montana Electric Generation and Transmission Cooperative, Inc. (hereafter, "SME"), which plans to permit, construct and operate HGS, a 215-250 mW electrical generating facility.

The Rezoning Application describes the ongoing fuels and materials needed to operate the HGS, including coal consumption estimated to be 1,314,000 tons per year. Coal will be delivered by train, and fly ash from the coal combustion process will be disposed of onsite. (*Id.*, p. 12.) Construction of the HGS will also necessitate construction of a number of utility facilities and infrastructure on land owned by Appellants, described in the Rezoning Application:

> In addition to construction of the HGS on the Real Property, construction of the following utility facilities and infrastructure on and in the vicinity of the Real Property are planned: a rail spur; raw water intake at the Morony Reservoir on the Missouri River; raw water pipeline; two 230 kV transmission lines; a new switchyard; potable and wastewater lines; and access roads.

(*Id.*, pp. 11-12.)[1]

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[1]Throughout the Rezoning Application, references were made to the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) (both part of Tab C) prepared for SME's proposed coal-fired power plant. Likewise, the Staff Report relies throughout on the FEIS and ROD. (See *passim* 11/19/07 Staff Report, Tab D; and 01/10/08 Agenda Action Report, Tab E.) The FEIS and ROD considered locating SME's proposed coal-fired power plant in Cascade County's Industrial Park, which was already zoned Industrial. However, the FEIS and ROD, and later the Rezoning Application and Staff Report, all favored the Salem site as the preferred

The Rezoning Application admits that all of the property which is sought to be rezoned from Agricultural (A-2) to Heavy Industrial (I-2) is used for agricultural purposes. (*Id.*, p. 3.)

Likewise, the Cascade County Planning Department's Staff Report describes the existing land use as agricultural, and the existing zoning as "A-2" Agricultural. (Tab D, p. 2; Tab E, p. 5.) As to the "Surrounding Zoning and Land Uses" the Staff Report (Id., p. 2) states:

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alternative on the basis that operation of the coal-fired power plant at the Industrial Park would require coal trains to travel through the City of Great Falls disrupting traffic, and that disposal of coal ash could not take place onsite at the Industrial Park because of the smaller area. (See, *e.g.*, Tab D, p. 13; and Tab E, p. 13.)

Ironically, on August 3, 2009, the Montana Department of Environmental Quality received from SME a request that its Air Quality Permit to operate HGS as a coal-fired power plant be revoked, on the basis that SME was now planning to build a natural gas-powered facility at HGS. (Tab O(1).) However, SME's General Manager Tim Gregori, described SME's move as a realignment of "our order of build-out" of generation and not the death of a coal-fired facility. (Tab P.) Although no construction is presently occurring on the site, SME continues to pursue permits required to construct an electrical generating facility on the Salem site. Thus, both the threats to adjacent landowners and a justiciable controversy remain.

Direction	Legal Description	Zoning Classification	Existing Land Use
North	Parcel #5356400	A-2 Agricultural>20 acres	Agricultural Production
Northeast	Parcel #5118800	A-2 Agricultural>20 acres	Agricultural Production
East	Parcel #5120100, #5364000	A-2 Agricultural>20 acres	Agricultural Production
Southeast	Parcel #5365100	A-2 Agricultural>20 acres	Agricultural Production
South	Parcel #5365100, #5365400	A-2 Agricultural>20 acres	Agricultural Production
Southwest	Parcel #5366900	A-2 Agricultural> 20 acres	Agricultural Production
West	Parcel #5366900, #5362700	A-2 Agricultural>20 acres	Agricultural Production
Northwest	Parcel #5357500	A-2 Agricultural>20 acres	Agricultural Production

Approximately 200 acres of the rezoned land is within the boundaries of the Lewis and Clark Great Falls Portage National Historic Landmark. (Affidavit of Kathleen McMahon, Tab F, p. 33.) National Historic Landmarks are designated by the Secretary of Interior because they possess exceptional value in preserving the national heritage of the United States. According to the National Park Service, "despite the claim 'significant mitigation measures are planned to offset the impacts of the HGS' . . . it is our belief that HGS cannot be mitigated at the Salem site and such construction would result in delisting of most, if not all the NHL." (Tab H, p.

2.) Section 7.4.2.1 of the Cascade County Zoning Regulations (CCZR) states that permitted uses in the Heavy Industrial (I-2) District are, "All uses not otherwise prohibited by laws." (Tab I.) The types of uses that are defined as Heavy Industrial under the Regulations, CCZR § 2.99.28, include:

> Place and/or building, or portion thereof, that is used or is intended for the following or similar uses: processing or manufacturer of materials or products predominantly from extracted or raw materials; storage of or manufacturing processes using flammable or explosive materials; or storage or manufacturing processes that potentially involve hazardous or commonly recognized offensive conditions; the term includes motor vehicle assembly, oil refineries, textile production, sawmills, post and pole plants, log yards, asphalt and concrete operations, primary metal processing, and the like.

The Staff Reports (Tabs D & E) focus exclusively on use of the land for the construction of the HGS facility, and throughout the Staff Reports it is noted that the proposed rezoning does not comply with applicable review criteria unless a number of conditions are imposed. The Staff Reports failed to discuss or analyze whether the other uses allowed by the Heavy Industrial zoning (the so-called "litany of uses") would comply with the criteria required by applicable statutes and regulations. As discussed below, this limited analysis is emblematic of "special legislation," a hallmark of spot zoning. Moreover, "conditional zoning" is not recognized by, nor standards provided for, in the Cascade County Zoning Regulations.

The complete "Recommendation" set forth in the Staff Report provided as follows:

> RECOMMENDATION
>
> It is recommended that the Planning Board recommend to the County Commission **approval** of the request to rezone Parcels #5364100, #5364200, and #5364300 in Section 24, and Parcel #5365200 in Section 25, Township 21 North Range 5 East, P.M.M., Cascade County, Montana from "A-2" Agricultural to "I-2" Heavy Industrial.

(Tab D at p. 3; underlining added, bolding in original.)[2] The recommendation included no mention of conditional zoning.

In the motions approving the Resolution of Intention to rezone and the Final Resolution to Rezone, the Commissioners made the rezoning "subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the Applicants, dated January 9th, 2008, and attached hereto." (Tab J; Disk 1, Binder 11, p. 110445.) Included among the eleven conditions was that, "SME agrees, as a condition of rezoning to heavy industrial use, that such use shall be solely for purposes of an electrical power plant." The letter dated January 9, 2008, and received by the Planning Office on January 11 just two business days prior to the hearing before the Commissioners, further represented that, "SME will present testimony and documentation on each of these areas at the rezoning hearing on January 15."

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[2]Unless otherwise indicated all emphasis herein is added.

SME's letter dated January 9, 2008 (Tab G(7)), setting forth the eleven conditions that were incorporated into the motions to rezone adopted by the County Commissioners was not available to the public, the Planning Department, or the Planning Board at the time of the Planning Board hearing on December 4, 2007, or at the time that required public notices of the Planning Board hearing were published. Nor was the "testimony and documentation of each of these areas" that was submitted by SME at the time of the January 15, 2008, public hearing before the County Commissioners available to the public, the Planning Department or the Planning Board at the time of the public hearing before the Planning Board on December 4, 2007. (Second Affidavit of Anne Hedges, ¶ 11; Tab G.)

Consistent with the Staff Report, whose "Recommendation" included no reference to conditional zoning, neither the public nor the Planning Board discussed "conditional zoning" at the hearing before the Planning Board. In accord with the Recommendation in the Staff Report, the Planning Board approved on a 5-4 vote the following motion:

> MR. KESSEL: Let me make this more technical. I recommend the planning board recommend the county commission approval of a request to rezone Parcel Numbers 5364100 and 5364200 and 5364300 in Section 24, and Parcel Number 5365200 in Section 25, Township 21 north, Range 5 east, P.M.M., Cascade County, Montana, from A-2 agriculture to I-2 heavy industrial.

(Transcript of December 4, 2007, Planning Board hearing at p. 270; Disk 1, Binder 11, p. 110279; Tab G(4).)

The first time the Plaintiffs learned of the SME letter and its eleven proposed conditions of rezoning was during the course of the January 15, 2008, public hearing before the County Commissioners on the proposed rezoning. (Second Affidavit of Anne Hedges at ¶ 11; Tab G.) The first time that Appellants became aware of the voluminous documentation submitted by SME in support of the conditions of rezoning was also at the January 15, 2008, public hearing. (*Id.* at ¶ 13.) The documentation submitted at that time included a traffic impact study, a baseline noise study, a review of scientific studies concerning coal-fired power plants and children's health, a report on whether organic farming will be harmed by HGS emissions, material on the effects of the Colstrip power plant on range resources and stack emissions, a property appraisal report, and a landscape plan. The documentation contained technical information that would require a significant amount of time to review and prepare informed responses. (*Id.*) However, the public hearing was closed at the end of the January 15, 2008, public hearing. (Transcript of January 15, 2008 public hearing at p.360; Tab G(10).)

On January 31, 2008, the County Commissioners met to consider a motion to approve passage of a Resolution of Intent to rezone the Urquharts' property from

"A-2" Agricultural to "I-2" Heavy Industrial. The motion stated:

> COMMISSIONER BRIGGS: Mr. Chairman, I move the Cascade County Commission approve the Resolution of Intention to rezone . . . from A-2 agricultural to I-2 heavy industrial, subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the applicants, dated January 9th, 2008, and attached hereto.

(Transcript of January 31, 2008 Commission Meeting at p. 2; Disk 1, Binder 11, p. 110445; Tab J.) The motion to approve passed 2 to 1.

On March 11, 2008, the County Commissioners met to consider Final Resolution 08-22, to rezone the Urquharts' parcels from "A-2" Agricultural to "I-2" Heavy Industrial, subject to the eleven conditions proposed by SME, which passed on a 2 to 1 vote, with Commissioner Beltrone opposing on the basis that the rezoning "is the definition of spot zoning." (See Transcript of March 11, 2008, meeting at pp. 4, 6; Tab K.)

Over 1,900 concerned citizens commented or protested in one form or another on the proposed rezoning. (See Cascade County's Disk 1, Binder 12, pp. 228-91; Disk 1, Binder 11, pp. 13-14; and Disk 1, Binder 9, p. 1018.) As further indicated by the extensive media coverage on the requested zone change, this matter was of significant interest to the public. (Affidavit of Anne Hedges at ¶ 6, Tab L.)

IV. STANDARD OF REVIEW

The Supreme Court reviews the District Court's grant of summary judgment *de novo*, applying the same Rule 56(c) criteria used by the District Court. *Citizens for Responsible Development v. Board of County Comm'rs of Sanders County*, 2009 MT 182, ¶ 7, 351 Mont. 40, 208 P.3d 876; *Matter of Estate of Lien* (1995), 270 Mont. 295, 298, 892 P.2d 530, 532. The Supreme Court will review the District Court's conclusions of law to determine whether its interpretation of the law is correct. *Carbon County v. Union Reserve Coal Co., Inc.* (1995), 271 Mont. 459, 469, 898 P.2d 680, 686.

V. ARGUMENT

A. The Rezoning From Agricultural to Heavy Industrial Constituted Spot Zoning.

1. The District Court erred in its analysis of spot zoning.

This Court has developed a three-part test for analyzing spot zoning. *See Little v. Board of County Comm'rs of Flathead County* (1981), 193 Mont. 334, 631 P.2d 1282. Here, the District Court engaged that three-part analysis and found "compelling" bases in favor of Plains Grains' argument under the *Little* standard. In spite of its analysis, however, the District Court retreated altogether and erroneously held that "spot zoning is not implicated in this case." (Order at p. 25; Tab A.) The

Court's conclusion was predicated upon the Agenda Action Report prepared by the Planning Department, which states:

> When the County adopted its county-wide zoning the County determined that electrical generation facilities are appropriate land uses within the agricultural zoning district upon satisfying the special use permit process. Converting the subject property to I-2, so long as it is limited to the HGS facility, would not be significantly different than allowing such a facility in the existing A-2 district with a special use permit.

(Agenda Action Report, p. 12, Tab E; cited in Order at pp. 24-26, Tab A.).

Several fundamental flaws undermine the Staff's conclusions, which are carried over into the Court's conclusions regarding spot zoning. The following arguments demonstrate that the District Court's conclusion that spot zoning is not implicated in this case constitutes an error of law and is based upon a manifest misapplication of the Cascade County Zoning Regulations.

a. The District Court conflated the distinction between a special use permit proceeding and a zone change proceeding.

There is a fundamental distinction between a proceeding for a special use permit before the Board of Adjustment and a rezoning proceeding before the County Commissioners. Here, Urquharts and SME determined that the rezoning of the 668 acres was a required prerequisite to the construction and operation of HGS. (Tab C, p. 1.) Hence, a Rezoning Application was submitted and the matter went before the

Commissioners for decision as a request for rezoning. SME did not attempt to proceed with HGS as an "already permissible" use in the Agricultural District, and the County never followed the process for considering HGS pursuant to a special use permit within the Agricultural District.[3] The District Court erred in unilaterally construing HGS and the rezoning application as an already permissible special use after the fact. This case needed to have been treated below (and now here in this Court) as the rezoning issue that it is.

b. The District Court erred in applying regulations applicable to commercial wind farms to HGS.

Both the Planning Staff and the District Court concluded that HGS would be allowed within the existing A-2 zoning district because it was an electrical generation

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[3]The Cascade County Zoning Regulations state in relevant part that, "Special exception uses may be permitted in a zoning classification district if special provision for such special exception is explicitly listed in the Zoning District Regulations as a special exception and a special permit is issued." (CCZR § 2.99.180; Tab I.) Consideration of a "special permit" must adhere to CCZR § 8, wherein "each specific use shall be considered as an individual case" and such permit "may be issued only upon meeting all requirements in these regulations for a specific use which is explicitly mentioned as one of the 'Uses Permitted Upon Issuance of a Special Use Permit as Provided in § 8 . . ." (CCZR § 8.1; Tab I.) The CCZR require the Board of Adjustment, not the County Commissioners, to review a special use permit application, (see CCZR § 8.8; Tab I), and then, the Board of Adjustment can only approve a special use permit request upon first reaching a number of conclusions, including, "The proposed development will be in harmony with the area in which it is located." (CCZR § 8.5.4; Tab I.)

facility. The source of this error is CCZR § 7.2.3.16 (Tab I), which contemplates a special use exception in the A-2 District for electrical generation facilities that are attendant to commercial wind farms, not massive coal-fired power plants:

> Commercial Wind Farms/Electrical Generation Facilities providing that the use is in compliance with all other Federal, State and County regulations.

Beyond the District Court's above-described error in retro-fitting the requested zone change into the special use exception which was never requested here, the commercial wind farm regulation being relied upon cannot support a stand-alone special use for the coal-fired HGS.

As used in CCZR § 7.2.3.16, the term "Electrical Generation Facilities" depends upon such facility being attendant to a "Commercial Wind Farm." The District Court erroneously interpreted the slash ("/") between "Commercial Wind Farm" and "Electrical Generation Facilities" as an "and" or an "or." Other parts of the CCZR highlight the District Court's error. For example, the special use which immediately precedes "Commercial Wind Farms/Electrical Generation Facilities" allows for:

> Mobile Home Park **or** Recreational Vehicle Park providing that the use is in compliance with all other Federal, State and County regulations.

(CCZR § 7.2.3.15; Tab I.) In contrast, the drafters of the special use regulation for

Commercial Wind Farms/Electrical Generation Facilities did not use the conjunction "or", but instead relied upon a slash to communicate the need for such electrical generation facilities to be attendant, rather than alternative to the preceding "commercial wind farm" phrase.

As such, any special exception that might exist within A-2 zoning for "Electrical Generation Facilities" is tethered to "Commercial Wind Farms." The coal-fired power plant described in SME's Application for Rezoning is simply inapposite to a commercial wind farm. This construction is bolstered by recalling that the provision for "Commercial Wind Farms/Electrical Generation Facilities" exists as a "special exception" requiring a special use permit. (CCZR § 7.2.3; Tab I.) The CCZR instruct that such a special exception must be "explicitly listed in the Zoning District Regulations." (CCZR § 2.99.180; Tab I.) Likewise, this construction is further supported by the Montana Supreme Court's determination that legislation which promotes the public health, safety and welfare[4] (and hence implementing regulations) must be liberally construed to achieve these objectives, and any exception should be given a narrow interpretation. *State ex rel. Florence-Carlton School Dist. v. Board of County Comm'rs of Ravalli County* (1978), 180 Mont. 285,

[4]The explicit purpose of county zoning is "promoting the public health, safety, morals and general welfare." § 76-2-201(1), MCA.

291, 590 P.2d 602, 605. *Accord* CCZR § 15.1 (Interpretation, Conflict with Other Laws; Tab I.)

In sum, it was error for the District Court to consider this rezoning case in the context of a non-applicable special use regulation, CCZR § 7.2.3.16. This conclusion is corroborated by and consistent with other relevant provisions of the CCZR, which clearly limit the HGS industrial complex to an Industrial District.

c. The District Court erred in concluding that the Heavy Industrial HGS use would be allowable in the Agricultural zoning district.

The Cascade County Zoning Regulations only allow "Industrial Uses" within an I-1 (Light Industrial) or I-2 (Heavy Industrial) zoning district. *See* CCZR § 2.99.31 at Tab I (defining "Industrial Uses" as "Uses of land which are allowed by right or through the special permit process only in the I-1 or I-2 zoning classifications, as listed in these regulations."). Thus, even under a special use permit process, an "Industrial Use" can only occur in an I-1 or I-2 zoning classification.

Here, SME succinctly describes the HGS coal-fired power complex as follows:

> The plant will combust approximately 1,200,000 tons of coal annually. The combustion of coal will result in the generation of approximately 225 tons of ash per day or approximately 77,000 tons per year. The proposed project includes construction or installation of the CFB boiler, electric turbine, generator, coal storage and handling facilities and substation, 400 foot chimney, ash monofill, four wind turbine electric generators, water and wastewater treatment, cooling tower, railroad

> access, electric transmission lines, water supply from the Missouri River, wastewater disposal and potable water supply lines to the City of Great Falls, and access road improvements.

(Tab M, p.1.) This description of the massive HGS complex clearly matches the uses defined by the CCZR as "Heavy Industrial:"

> Place and/or building, or portion thereof, that is used or is intended for the following or similar uses: processing or manufacture of materials or products predominantly from extracted or raw materials; storage of or manufacturing processes using flammable or explosive materials; or storage or manufacturing processes that potentially involve hazardous or commonly recognized offensive conditions; the term includes motor vehicle assembly, oil refineries, textile production, sawmills, post and pole plants, log yards, asphalt and concrete operations, primary metal processing, and the like.

(CCZR § 2.99.28, Tab I.)

In short, the Cascade County Zoning Regulations simply do not support the District Court's error of interpreting the HGS "Industrial Use" as "already permissible" in the existing A-2 Agricultural District by virtue of the special exception provision for "Commercial Wind Farms/Electrical Generation Facilities." Electric generation facilities are <u>always</u> a component part of a specific means of production; *i.e.* a commercial wind farm, a hydroelectric dam, a nuclear reactor, or a coal-fired power plant. Where, as here, the electric generation facilities are attendant to the HGS coal-fired industrial power complex proposed by SME, then it is clearly a "Heavy Industrial" use as defined by CCZR § 2.99.28, and clearly limited to an

Industrial zoning classification by CCZR § 2.99.31. Hence the zone change from Agricultural to Industrial was applied for.

Thus, the District Court's conclusion that the industrial coal-fired power complex was "already permissible" in the A-2 Agricultural Zoning District is clearly a mistake of law.

2. The Zone Change constitutes illegal spot zoning.

Had the District Court not erroneously undermined its application of the spot zoning test articulated by this Court in *Little* through its conclusion that the HGS was "already permissible" in the Agricultural District, Plains Grains' motion for summary judgment on the spot zoning claim would have been, and should be, granted.

As this Court explained in the seminal case of *Little v. Board of County Comm'rs of Flathead County*:

> There is no single, comprehensive definition of spot zoning applicable to all fact situations. Generally, however, three factors enter into determining whether spot zoning exists in any given instance. First, in spot zoning, the requested use is significantly different from the prevailing use in the area. Second, the area in which the requested use is to apply is rather small. This test, however, is concerned more with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited. Third, the requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Little, 193 Mont. at 346, 631 P.2d at 1289. Accord, *Greater Yellowstone Coalition,*

Inc. v. Board of County Comm'rs of Gallatin County, 2001 MT 99, ¶ 21, 305 Mont. 232, 25 P.3d 168.

Subsequent to the articulation of the three-prong test in *Little*, the Court has made clear that, "since we held in *Little* that 'usually' all three elements are required to establish illegal spot zoning, it is possible that illegal spot zoning can occur in the absence of an element." *Boland v. City of Great Falls* (1996), 275 Mont. 128, 134, 910 P.2d 890, 894. In addition, *Boland* clarified that the "primary focus" of the second and third *Little* factors must be on "not the benefit resulting from the development of the Property, but rather the benefit to landowners as a result of the rezoning." *Id.*

Here, the rezoning from Agricultural to Heavy Industrial meets each factor in the spot zoning analysis articulated by the Supreme Court.

a. Adjoining land use.

The first factor considers whether the requested use is significantly different from the prevailing use in the area, which here is clearly agricultural. According to the Application for Rezoning, "The predominant land use is grain farming and cattle ranching, on a large-scale, commercial basis as opposed to hobby use." (Tab C, p. 3.) Likewise, the Staff Report confirms that the "Existing Land Use" is "Agricultural Production" in virtually every direction. (Tab D, p. 2.)

The District Court's Order acknowledges that the rezoning to Heavy Industrial to allow for construction of HGS is unquestionably a change of use from that prevailing in the area. However, the District Court erroneously concludes that the coal-fired power plant was already a permissible use in the agricultural area prior to the rezoning request and, therefore, spot zoning is not implicated:

> Thus, while the coal fired plant will be a different use than agricultural, it certainly was already permissible in that agricultural area prior to the rezoning request. Thus, spot zoning is not implicated in this case.

(Order at p. 25; Tab A).

First, as set forth above, the District Court erroneously concluded that the coal-fired power plant "was already permissible" in the Agricultural District. Second, the test established by the Supreme Court is, "whether the requested use is significantly different from the prevailing use in the area." *Little*, 631 P.2d at 1289; *Greater Yellowstone Coalition*, ¶ 21. Here, the prevailing use is unarguably agriculture. When properly considered, the first prong of the spot zoning test is clearly met.

b. Size of the area.

In upholding the District Court's finding of spot zoning, the *Greater Yellowstone Coalition (GYC)* Court explained:

> The second prong of the *Little* test for spot zoning focuses on the size of the area in which the requested use is to apply, but is not limited to the physical size of the parcel. It also includes analysis of how many

> separate landowners stand to benefit from the proposed zoning change. The District Court found that the Duck Creek parcel was small in relation to the Hebgen Lake Zoning District - the 323 acres at issue comprise a mere 2% of the District's 13,280 acres. * * * More importantly, the *Little* test focuses on the number of owners who stand to benefit from the zoning change.

GYC, ¶¶ 26-28.

An analysis of the A-2 zoning district indicates that there are some 1,560,000 acres in Cascade County that are zoned A-2. The subject property (consisting of 668 acres) constitutes only .05% of the total A-2 zoning district's acreage. (Tab F, p. 56.)

As regards this prong of the spot zoning test, the District Court determined:

> On the surface, Plaintiffs appear to have a compelling argument. The proposed rezone area would comprise 'less than .05% of the total Zoning District area, Writ, p. 31, ¶ 75, and it looks to benefit only one landowner which is now SME. *See Greater Yellowstone Coalition v. Bd. of Commiss. of Gallatin Co.*, 2001 MT 99, 305 Mont. 232, 25 P.3d 168. However, this zoning 'change' was not required for the intended uses. Agenda Action Report, p. 11. Consequently, no spot zoning occurred where such use was already allowed by existing zoning regulations. *Id.*

(Order at p. 25; Tab A.)

Once again, the District Court clearly proceeded under a mistake of law when it concluded that the second prong was not met because "no spot zoning occurred where such use was already allowed by existing zoning regulations." When properly considered, the Plains Grains indeed "have a compelling argument" and the second

prong of the spot zoning test is clearly met. That is, the requested zone change is unarguably small in relation to the zoning district, constituting only .05% of the A-2 zoning district. *Cf., GYC*, at ¶ 27 ("the 323 acres at issue comprise a mere 2% of the District's 13,280 acres").

c. Special legislation.

As explained by this Court in *Greater Yellowstone Coalition* at ¶ 29:

> The issue presented by the third prong is whether the zoning request is in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public. *Little*, 193 Mont. at 346, 631 P.2d at 1289.

The Urquharts are the immediate sole beneficiaries of this dramatic zone change, which is intended for the sole purpose of allowing SME to construct and operate its coal-fired power plant in the middle of this agricultural area. As if to add emphasis to the rezoning as special legislation, the rezoning approved by the Commissioners is subject to eleven special conditions which apply **only** to SME (Tab K, p. 3), including the following:

> SME agrees, as a condition of rezoning to Heavy Industrial use, that such use shall be solely for the purposes of an electric power plant.

(Tab G(7), p. 1.)

Unarguably the rezoning will come at the expense of surrounding landowners. Construction of the electric power plant, the only contemplated use of the rezoned

property, will necessitate constructing, on the surrounding landowners' land, railroad tracks, transmission lines, sewer lines, and water lines. (Tab C, pp. 11, 12.) No Plaintiffs (Appellants herein) will willingly part with their agricultural lands to allow for the 100 foot wide swaths of utility corridors crossing their lands to serve the industrial complex. Their farmland will need to be taken from them through condemnation proceedings. (Tab G, ¶ 10; see also Tab G(10).) One can hardly think of a more compelling example of rezoning coming at the expense of surrounding landowners. But the impacts do not end with the taking of land from the surrounding landowners. As explained in the Final Environmental Impact Statement (Tab N at Page 4-109):

- "Impacts associated with air quality, noise, visual resources, and traffic would all potentially decrease the quality of life for area residents downwind of the facility or adjacent to transportation routes," which impacts could be "perceived as adverse enough to residents that they would choose to relocate."

- "Land put up for sale in the area may be attractive to an industrial developer," and the "addition of any industry would perpetuate the impacts of decreasing the quality of life for residents of this rural agricultural area, and over time this cycle could continue and the predominant land use in the area could change from being primarily farmland to being primarily industrial land."

The *GYC* case is further instructive as to the third prong of the spot zoning test. In that case, the area rezoned by the Gallatin County Commissioners was important

to wildlife and was adjacent to public land that "includes some of the most significant wildlife habitat in the country." *Id.*, ¶ 32. Officials from a number of public agencies opposed the rezoning because of the negative impacts on this nationally important habitat. This was an additional factor relied on by the District Court in finding that the rezoning was in the nature of special legislation. *Id.*, ¶¶ 32-34.

Here, approximately 200 acres of land rezoned to Heavy Industrial are within the boundaries of the Lewis and Clark Great Falls Portage National Historic Landmark. National Historic Landmarks are nationally significant places designated by the Secretary of Interior because they possess exceptional value in preserving the heritage of the United States. According to comments from the National Park Service in regards to construction of HGS, "such construction would result in delisting of most, if not all the NHL." (Tab H, p. 2.) Thus, as in *GYC*, the significant negative impact to an important public resource is one more indicia that the proposed rezoning is "special legislation."

Finally, although the Staff Report acknowledges that the proposed rezoning does not comply with a number of goals and objectives of the Growth Policy (Tab D, pp. 9-12), the Staff Report concludes that "the level of compliance is acceptable" again on the basis of its previously stated conclusion that:

> When the County adopted its county-wide zoning the County determined that electrical generation facilities are appropriate land uses within the agricultural zoning district upon satisfying the special use permit process.

(Tab D, pp. 12.) Likewise, the District Court again relied on this provision of the Staff Report in determining that the third prong of the spot zoning test was not met, thereby repeating the same error with prong three as it made with prongs one and two above. (See Order at pp. 25-26; Tab A.) The explication of this error is set forth above and incorporated here by reference.

In sum, the "special legislation" test is clearly met. It is unarguable that the Urquharts were the immediate sole beneficiaries of this dramatic zone change, which was intended for the sole purpose of allowing SME to construct and operate its power plant in the middle of this agricultural area. Meanwhile, numerous other landowners will have to watch as their agricultural operations are disrupted, their property is condemned, and their quality of life is destroyed. In addition, an irreplaceable National Historic Landmark will be scarred and suffer delisting, which "would be an irreplaceable loss to the national heritage of our country for the construction of a facility with an expected life span of 40 years."

All three prongs of the spot zoning test are met. The District Court's conclusion to the contrary is predicated upon a mistake of law.

B. The Conditional Rezoning Is Illegal.

1. No ordinance or regulation provides standards or procedures for conditional zoning, which violates the "uniformity requirement."

Section 14 of the Cascade County Zoning Regulations (Tab I), sets forth the standards and procedures for amending the zoning regulations or maps. Nowhere in those regulations, or anywhere else in the Cascade County Zoning Regulations, are there procedures or standards for "conditional zoning." Nevertheless, by letter dated January 9, 2008 (Tab G(7)), SME requested that the rezoning contain eleven conditions which applied only to SME. Those eleven conditions were then included in the motion to approve the rezoning (Tab K), and passed on a 2-1 vote.

A review of the zoning statutes reveals that there is no explicit statutory authority for conditional zoning. There is, however, the so-called "uniformity requirement" that, "all regulations must be uniform for each class or kind of buildings throughout a district, but the regulations in one district may differ from those in other districts." § 76-2-202(5), MCA. Thus, when allowed, conditional zoning must be based on specific regulations and apply uniform standards. As explained by the Connecticut Supreme Court:

> [Z]one changes may be conditionally granted only when regulations authorize conditions to be imposed in specific circumstances, and when the regulations are uniformly applied. A general rule requiring uniform

> regulations serves the interests of providing fair notice to applicants and of ensuring their equal treatment.

Kaufman v. Zoning Comm'n of City of Danbury (Conn. 1995), 653 A.2d 798, 812 (citations omitted); see also *Andres v. Village of Flossmoor* (Ill. Ct. App. 1973), 304 N.E.2d 700, 703 ("the making of individualized zoning deals by local municipalities, apart from the provisions they are willing to adopt as general zoning regulations, is an invalid abuse of the zoning power").

The McMahon Report (Tab F (27)) discusses conditional zoning and points out that at least one town in Montana, the City of Whitefish, allows conditional zoning. Significantly, however, Whitefish passed a zoning ordinance which includes procedures and standards for imposing conditions; *i.e.* there is "uniformity." (See McMahon Report, Tab F(27) at pp. 52-54.)

2. Basic legal standards that apply to conditional zoning.

This brings us to a consideration of the basic legal standards that apply to a local governing body's exercise of its police power to zone or rezone. First, enacting or amending a zoning designation constitutes a legislative act. *Schanz v. City of Billings* (1979), 182 Mont. 328, 335, 597 P.2d 67, 71. Second, when exercising this legislative power to enact zoning ordinances and regulations, the local governing body must comply with the constitutional requirements of equal protection, and

substantive and procedural due process, including giving fair notice of what the zoning ordinance or regulation purports to accomplish (the void for vagueness doctrine). *Yurczyk v. Yellowstone County*, 2004 MT 3, 319 Mont. 169, 83 P.3d 266. The "uniformity doctrine" is a reflection of these limitations:

> Zoning ordinances must not only be nondiscriminatory and reasonable, but also applied in a uniform and reasonable manner in order to be enforceable. . . . An ordinance may be held lacking in uniformity if it is so vague as to be capable of being applied in a discriminatory manner.

83 Am. Jur. 2d *Zoning and Planning* (1992), § 128 "Uniformity," citing *Taylor v. Moore* (1931), 303 Pa. 469, 479, 154 A. 799, 802, which held:

> While the exercise of discretion and judgment is to a certain extent necessary for the proper administration of zoning ordinances, this is so only where some standard or basis is fixed by which such discretion and judgment may be exercised by the board. Where a zoning ordinance is vague and indefinite, it cannot be sustained as valid under the authorizing act.

Assuming *arguendo* that Montana's zoning statutes authorize local governing bodies to engage in conditional zoning, then there is still the need to meet the basic standards required of local governing bodies in exercising their legislative power in adopting zoning ordinances and regulations. Thus, in accord with the above-referenced principles, the Montana Supreme Court has not hesitated to strike down under the "void for vagueness" doctrine a zoning regulation which failed to give a person of ordinary intelligence fair notice of the substance of the regulation.

In *Yurczyk*, landowners brought an action against Yellowstone County alleging that zoning regulations requiring "onsite construction" of dwelling units was (among other deficiencies) " void for vagueness," with which the Supreme Court agreed. *Yurczyk*, ¶¶ 32-33. In *Yurczyk*, at least there was a written zoning regulation that Yellowstone County was relying on. Here, the "vague regulation" is even more amorphous. There are no written zoning regulations which set forth procedures, standards, and definitions governing the review, enactment, and enforcement of conditional zoning in Cascade County. Nor does the Resolution enacting the conditional rezoning contain any such procedures and standards.

Thus, the conditional rezoning at issue not only suffers from impermissible vagueness, but violates the requirements of the enabling legislation. In that regard, it should be noted that § 76-2-202(5), MCA ("all regulations must be uniform . . .") and § 76-2-203(1)(2), MCA ("zoning regulations must be . . ."), clearly contemplate that a county will and must enact zoning regulations when exercising its statutorily delegated zoning authority. While neither statute explicitly authorizes conditional zoning, it is instructive that where local governing bodies have implemented conditional zoning (*i.e.* the City of Whitefish, see Tab F(27)), it has been accompanied by zoning regulations which: 1) define conditional zoning; 2) require that the proposed statement of conditions are in a form recordable with the County

Clerk and Recorder; 3) contain a statement acknowledging that the statement of conditions runs with the land; 4) require that if the statement of conditions references other documents (as here), then the other documents must either be recorded with the statement of conditions, or specify where the documents may be examined; 5) upon the conditional zoning taking affect, the zoning map is required to be amended to reflect the new zoning classification along with the designation that the land was zoned with a statement of conditions; 6) provide that the failure to comply with all of the conditions is a violation of the zoning ordinance, with all remedies thereunder available to the local governing body; 7) specify time limitations within which the conditions must be implemented; and 8) provide for an orderly process for reversion of the conditionally rezoned property to its prior zoning classification, including public notice, public hearing before the Planning Board, and a public hearing before the local governing body. Here, there are neither zoning regulations nor provisions in the Resolution which put these safeguards in place.

Emblematic of this failure is the email of February 25, 2008 (Tab G (13)), from Brian Hopkins, the Deputy County Attorney assigned to this proceeding, who attempted to explain his understanding and the Commissioners' intention regarding what happens if SME is unable or unwilling to meet the conditions:

> Ms. Ward, The notice of intent to rezone was approved subject to the eleven conditions offered by Tim Gregori of SME, representing the applicants, dated January 9, 2008. I believe that the property reverts to A2 if SME is unable or unwilling to meet those conditions; at least that was the Commissioners' intention in adding the conditions to the rezoning motion rather than simply making them part of a location conformance permit.

Although this may have been the Commissioners' intention, there is simply no provision in either the motion, the Resolution, or the Cascade County Zoning Regulations specifying what happens if SME is unable or unwilling to meet the conditions.

While SME and the Commissioners argued below that the Supreme Court has expressly approved the process of conditional zoning, neither case put forth as authority for Montana's adoption of conditional zoning actually addressed the issue of conditional zoning. First, *Boland v. City of Great Falls* (1996), 275 Mont. 128, 910 P.2d 890, dealt with spot zoning. The Montana Supreme Court in *Boland* never analyzed, much less approved the appropriateness of conditions within the zoning action. Likewise, the Montana Supreme Court's decision in *Citizen Advocates for a Livable Missoula, Inc. v. City Council*, 2006 MT 47, 331 Mont. 269, 130 P.3d 1259, never addressed the issue of conditional zoning.

In sum, as explained by the Connecticut Supreme Court, "zone changes may be conditionally granted only when regulations authorize conditions to be imposed

in specific circumstances, and when the regulations are uniformly applied." *Kaufman, supra.* Here, the conditional rezoning at issue not only suffers from impermissible vagueness, but the conditional rezoning is arbitrary and capricious, constitutes an abuse of discretion, and violates the requirements of § 76-2-205(5), MCA, and § 76-2-203(1)(2), MCA. The conditional rezoning is illegal and void.

C. The Commissioners Violated the Public's Right to Participate.

Article II, § 8 of the Montana Constitution gives the public the right to participate in the decision-making process before governing bodies make final decisions. The Montana Public Participation Act, § 2-3-101, *et seq.*, MCA, implements this constitutional right. Montana law requires public bodies (including the Board of County Commissioners) to develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public. The required procedures must assure adequate notice and assist public participation before a final decision is made, and allow the public to submit data, views or argument before a final decision is made. § 2-3-103, MCA. Montana law further requires that:

> Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

§ 2-3-111(1), MCA.

The "reasonable opportunity" to participate requires that the public be fairly apprised concerning the proposal on which the governing body is to make a decision. In *Bryan v. Yellowstone County Elem. School Dist.*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381, the Montana Supreme Court held that, although members of the public were allowed to speak at a public hearing before the School Board and submit comments, they were not afforded the statutorily required "reasonable opportunity" to participate in the decision-making process because they did not have available to them all of the documents to which they were entitled. In *Bryan*, the plaintiff and other interested members of the public had tried to keep apprised of a proposal to close certain elementary schools in the district because of budget shortfalls. At the time of a public hearing before the School Board, a comparative analysis prepared by the Facilities Committee was distributed to the School Board. Neither the plaintiff nor other interested members of the public had had an opportunity to review this document.

Likewise, in the instant case the public was not afforded a reasonable opportunity to participate in the decision-making process. First, included among the mandatory requirements for notices in the zoning statutes and Cascade County Zoning Regulations is the requirement that the notice "must state" that "the proposed

zoning regulations are on file for public inspection at the office of the county clerk and recorder." See § 76-2-205(1)(d), -5(c), MCA; see also CCZR §§ 14.2.1.4 and 14.3.1.4.[5]

The conditions set forth in SME's letter dated January 9, 2008, are clearly "proposed zoning regulations" related to the rezoning of the 668 acres from A-2 to I-2. In the motion to approve the Resolution of Intention to rezone, the Commissioners explicitly incorporated the letter and its eleven conditions into the legislative enactment:

> COMMISSIONER BRIGGS: Mr. Chairman, I move the Cascade County Commission approve the Resolution of Intention to rezone . . . from A-2 agricultural to I-2 heavy industrial, subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the applicants, dated January 9th, 2008, and attached hereto.

(Transcript of January 31, 2008 Commission Meeting at p. 2; Disk 1, Binder 11, p. 110445; Tab J.)

Thus, these proposed zoning regulations were required to be on file for public inspection at the office of the County Clerk and Recorder and the Cascade County

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[5]"Must" and "shall" are mandatory rather than permissive." *Harris v. Smartt*, 2002 MT 239, ¶ 101, 311 Mont. 507, 57 P.2d 58, 72 (Nelson, J., concurring), citing *Montco v. Simonich* (1997), 285 Mont. 280, 287, 947 P.2d 1047, 1051 (citation omitted).

Planning Department at the time the public notices were published, as required by CCZR § 14.2.1.4 (Tab I) and § 76-2-205(1)(d), MCA. They were not. Instead, SME's letter requesting the conditional rezoning approved by the Commissioners was hand-delivered to the Planning Department on January 11, 2008, two business days prior to the January 15 public hearing. Moreover, the following undisputed facts are set forth in the Second Affidavit of Anne Hedges:

> MEIC and the other plaintiffs first learned of the existence of this letter requesting rezoning subject to the eleven conditions at the time of the public hearing before the Cascade County Commissioners on January 15, 2008. MEIC, as well as other interested members of the public, regularly checked on filings by SME with the Cascade County Planning Department. The Planning Department was aware of our keen interest in this rezoning proceeding. Yet neither MEIC nor other members of the interested public were notified of SME's letter dated January 9, 2008, prior to the January 15, 2008 public hearing. Neither MEIC, nor other plaintiffs, had the opportunity to conduct research on the proposal to "conditionally zone" the property, nor to offer reasonable comment on it during the January 15, 2008 public hearing. Had we been given a reasonable opportunity to do so, we would have been able to point out the numerous problems and deficiencies with the proposed conditional zoning, which we have complained of in this lawsuit.

(Second Affidavit of Anne Hedges at ¶ 11; Tab G.)

Second, in its letter requesting conditional rezoning SME stated, "SME will present testimony and documentation on each of these areas at the rezoning hearing on January 15." (Tab G(7) at p. 2.) During the Applicant's presentation to the County Commissioners at the time of the January 15, 2008, public hearing, SME

submitted to each of the Commissioners a three-inch binder containing hundreds of pages of technical information in support of its proposed conditional rezoning that had not previously been submitted and made available to the interested public in the rezoning proceeding. Once again, the Second Affidavit of Anne Hedges establishes the following undisputed facts:

> During the "Applicant's Presentation," SME submitted to each of the County Commissioners a three-inch binder containing hundreds of pages of technical information that had not previously been submitted in support of the conditional rezoning that it proposed, and which was not previously available in the rezoning proceeding to MEIC, the other plaintiffs, or other members of the public. This extensive technical documentation included a traffic impact study, a baseline noise study, a review of scientific studies concerning coal-fired power plants and childrens' health, a report on whether organic farming will be harmed by HGS emissions, information on the effects of the Colstrip Power Plant on range resources and stack emissions, a property appraisal report, and a landscape plan. (See Exhibit 9.) Even during the course of the January 15, 2008, public hearing MEIC and the other plaintiffs were not provided copies of these technical reports. Moreover, these reports contain technical information that would require a substantial amount of time to review and prepare an informed response. Yet, the public hearing was closed the same night the materials were submitted (Transcript of January 15, 2008 hearing at p. 360; Exhibit 10), and the opponents had no opportunity to review the additional submissions and make informed comments on them during the public hearing. Had the plaintiffs been given the opportunity, they would have rebutted and corrected representations made in these submissions, as is demonstrated by the extensive report submitted in this proceeding by land use consultant Kathleen McMahon (Exhibit 27).

(Second Affidavit of Anne Hedges at ¶ 13; Tab G.)

This case is analogous to *Bryan*. In that regard, it is instructive to note the *Bryan* Court's rational as to why it was compelled to reject the government entity's argument that simply providing citizens with the opportunity to speak fulfilled the constitutional and statutory mandate of public participation:

> Such a superficial interpretation of the right to participate to simply require an uninformed opportunity to speak would essentially relegate the right of participation to paper tiger status in the face of stifled disclosure and incognizance. Given the tenor of the delegates' insistence upon open government and citizen participation, we find it improbable that they envisioned and subsequently memorialized such a hollow right.
>
> Certainly, as the District suggests, Bryan was given the opportunity to voice her concern regarding the school closure recommendation. However, she participated under a distorted perspective in light of the District's partial disclosure of information . . .

Bryan, ¶¶ 43, 44.

In the instant case, not only did SME submit the three-inch binder of technical material in support of its request for conditional rezoning at the time of the January 15, 2008 public hearing, but the public hearing was closed at the conclusion of the hearing. ("Are there other opponents?...Hearing none, I'll close this public hearing."; Transcript of January 15, 2008 public hearing at p. 360; Tab G(10).) Thus, as in *Bryan*, Plaintiffs never had the opportunity to review, rebut or respond to either SME's proposed conditional rezoning, or the extensive technical materials submitted

in support of the conditional rezoning.

In its recent decision in *Citizens for Responsible Development v. Bd. of County Commr's of Sanders County,* 2009 MT 182, 12, 351 Mont. 40, 208 P.3d 876, the Montana Supreme Court made eminently clear the interconnection between the right of "reasonable opportunity for citizen participation" contained in the Montana Constitution and the disclosure requirements of the Montana Subdivision and Platting Act:

> The Montana Constitution provides that government agencies are to afford "such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Mont. Const. Art. II, § 8. The procedural requirements under subsection 604 [§ 76-3-604, MCA] facilitate public participation by informing the public at what stage the application is in the process—whether the governing body is assessing the completeness of the application or whether the process has moved ahead to the governing body's consideration of the substantive merits of the application.
>
> Similarly, the EA enhances public participation by summarizing the above-mentioned impacts upon the local community which the public can then consider and respond to, whether in agreement or disagreement. Failure to provide this information, or failure to provide it in a reasonably cohesive fashion, makes it difficult for the public to use the information. The Board argues that the crucial point is whether the Board had sufficient information before it. However, focusing on that point alone ignores the public participation purposes served by compliance with the statutory process.

Citizens for Responsible Development, ¶¶ 23-24 (footnote omitted).

Here, the procedures used by the Commissioners in adopting the conditional rezoning proposed by SME at the eleventh hour undermined the right of public participation. SME's submission of proposed conditions two working days before the public hearing before the Commissioners (and long after the public hearing before the Planning Board) came as a surprise to the public and did not afford them an opportunity to reasonably respond to the proposed conditional rezoning, including pointing out that there were neither procedures nor standards governing conditional zoning in the Cascade County Zoning Regulations. Moreover, SME submitted hundreds of pages of technical information in support of the proposed conditions at the time of the January 15, 2008 public hearing before the Commissioners, which the public had no opportunity to review, analyze, or prepare comments on at the time of the January 15, 2008 public hearing - - which was closed at its conclusion, thereby foreclosing any further comment by the interested public, including Appellants.

In sum, the "reasonable opportunity" to participate requires that the public be fairly apprised concerning the proposal on which the governing body is to make a decision, and has available to it prior to the public hearing all documents that are material to the governing body's decision. *Bryan; Citizens; supra.* Here, that clearly was not the case. The public, including Appellants, did not have a reasonable opportunity to participate in the decision-making process as required by Article II, §

8 of the Montana Constitution, and §§ 2-3-103, -111, MCA. Accordingly, the Commissioners' rezoning decision should have been set aside by the District Court pursuant to the provisions of § 2-3-114, MCA.

VI. CONCLUSION

Based on the foregoing, Plains Grains requests that the Court reverse the District Court and declare the conditional rezoning from Agricultural to Heavy Industrial to be unlawful, and to further declare that the rezoning is therefore void and of no effect.

Respectfully submitted this 14th day of August, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is produced in proportional font (Times New Roman) of not less than 14 point type, utilizes double line spacing, except in footnotes, headings and extended quotations, which are single spaced, and the word count calculated by WordPerfect 12 for Windows does not exceed 10,000 words, excluding certificate of service and certificate of compliance.

Dated this 14th day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2009, a true and correct copy of the foregoing document has been served via U.S. First Class Mail upon the following:

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